FILED
OCT 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-311

In the Supreme Court of the United States

OCTOBER TERM, 1989

CONSOLIDATED GAS COMPANY OF FLORIDA, INC., PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld the decision of the Federal Energy Regulatory Commission requiring petitioner, an owner and operator of an underground propane gas distribution system seeking to convert its system to natural gas, to pay for the lateral line connecting its system to an interstate pipeline's natural gas distribution system.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	7
Conclusion	9

TABLE OF AUTHORITIES

Cases:

Adickes v. *S.H. Kress & Co.*, 398 U.S. 144 (1970)	7
Charlottesville v. *FERC*, 661 F.2d 945 (D.C. Cir. 1981), cert. denied, 475 U.S. 1108 (1986)	8
Consolidated Gas Company of Florida, Inc. v. *City Gas Company of Florida, Inc.*, 665 F. Supp. 1493 (S.D. Fla. 1987), aff'd, 880 F.2d 297 (11th Cir. 1989)	5, 6
Electricity Consumers Resource Council v. *FERC*, 747 F.2d 1511 (D.C. Cir. 1984)	8
United States v. *Lovasco*, 431 U.S. 783 (1977)	7

Statutes:

Natural Gas Act, 15 U.S.C. 717 *et seq.*:	
§ 4(b), 15 U.S.C. 717c(b)	4
§ 7(a), 15 U.S.C. 717f(a)	2, 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A6) is unreported. The order of the Federal Energy Regulatory Commission requiring petitioner to finance the lateral line (Pet. App. A13-A23) is reported at 38 F.E.R.C. ¶ 61,317. The order of the Federal Regulatory Energy Commission denying rehearing (Pet. App. A7-A12) is reported at 42 F.E.R.C. ¶ 61,271. An earlier opinion of the court of appeals remanding the case to the Federal Energy Regulatory Commission (Pet. App. A24-A27) is unreported. The initial order of the Federal Energy Regulatory Commission (Pet. App. A31-A35) and its order denying rehearing (Pet. App. A28-A30) are reported at 28 F.E.R.C. ¶ 61,350, and 29 F.E.R.C. ¶ 61,205, respectively.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1989. A petition for rehearing was denied on May

17, 1989. Pet. App. A1. The petition for a writ of certiorari was filed on August 15, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Consolidated Gas Company of Florida, Inc., an owner and operator of an underground propane gas distribution system, sought to convert its system to natural gas. Petitioner therefore filed an application with the Federal Energy Regulatory Commission requesting that the Commission order Florida Gas Transmission Company (FGT), an interstate pipeline, to sell quantities of natural gas annually to petitioner through a lateral line connecting the two systems. Petitioner also sought an order requiring FGT to construct and pay for that lateral line, at an estimated cost of $250,000.

The Commission, under Section 7(a) of the Natural Gas Act (NGA), 15 U.S.C. 717f(a),[1] ordered FGT to provide service to petitioner through a new lateral line. The Commission, however, declined to order FGT to bear the costs of construction, interpreting FGT's tariff as requiring any customer, such as petitioner, to reimburse the pipeline for the cost of connecting that customer to FGT's system. This case involves petitioner's challenge to that part of the Commission's order requiring petitioner, as opposed to FGT, to pay for the lateral line connecting petitioner's system to FGT's interstate pipeline system.

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[1] Section 7(a) of the NGA, 15 U.S.C. 717f(a), authorizes the Commission to order an interstate pipeline to sell natural gas to and "establish physical connection of its transportation facilities with the facilities of" a distributor if such action will not impose an "undue burden" on the pipeline and will not "impair its ability to render adequate service to its customers."

1. In 1983, after an evidentiary hearing on petitioner's Section 7(a) application, the Administrative Law Judge issued his initial decision granting the request to order FGT to interconnect with and provide natural gas service to petitioner. Pet. App. A36-A60. The ALJ agreed with petitioner that FGT must pay for the new lateral line. The ALJ found that although FGT's tariff expressly requires any existing customer to pay for the construction of a new lateral line, it did not speak to requirements for new customers. Since the Commission's regulations require that a pipeline's tariff provide explicitly whether the pipeline or the customer will pay for new lateral lines, the ALJ concluded that FGT must absorb the cost. Pet. App. A46-A47.[2]

In 1984, the Commission upheld the ALJ's decision ordering FGT to provide service to petitioner, but reversed his order requiring FGT to pay for the lateral line. Pet. App. A31-A35. The Commission agreed with the ALJ that FGT's tariff imposes lateral construction costs on existing customers and does not speak to requirements for new customers. The Commission assumed, however, that this omission showed that a new customer such as petitioner

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[2] The ALJ took note of petitioner's pending federal court litigation against City Gas Company of Florida (City Gas), another distribution customer of FGT. In that action, petitioner alleged that City Gas had violated federal antitrust laws by, among other actions, obstructing petitioner's conversion to natural gas and expanding its services to take away petitioner's customers. The ALJ acknowledged that antitrust violations are "germane to disposition of a section 7 application," Pet. App. A48, but found that

> [t]his record * * * does not contain details sufficient to evaluate this matter as a public interest factor which, if proved, would weigh in favor of approval of [petitioner's] application. * * * The pending court proceeding and the state regulatory body, in the circumstances present here, are more appropriate forums to explore the propriety of expansion by City Gas.

Ibid.

would also pay for a lateral line. Pet. App. A33. Any differential treatment of new and existing customers in this context would, in the Commission's view, be "unduly discriminatory against existing customers." *Ibid.* Accordingly, the Commission held that petitioner must pay for the costs of its new lateral line.

In 1986, the court of appeals reversed and remanded the case to the Commission for further proceedings with respect to petitioner's obligation to pay for the lateral line. Pet. App. A24-A27. The court agreed with the Commission that FGT's tariff "is silent as to whether new customers must pay for lateral line construction," and that, "in fill[ing] in a gap left by the tariff drafter," the Commission must "ensure that pipelines do not unfairly discriminate among customers." *Id.* at A26 (citing Section 4(b) of the NGA, 15 U.S.C. 717c(b)). The court, however, concluded that the Commission had not adequately explained its decision, namely, showing why FGT's paying for petitioner's lateral line would discriminate among its customers when FGT paid for many of its existing customers' lateral lines when they had become new customers. Pet. App. A26-A27.

2. On remand, the Commission interpreted FGT's tariff to require any customer, including a new customer like petitioner, to pay for the construction of new lateral lines. The Commission therefore adhered to its earlier decision requiring petitioner to pay for the lateral line connecting it with FGT's system. Pet. App. A13-A23.

The Commission found that FGT's former policy (contained in an earlier tariff) obligated the pipeline to pay only for lateral lines to begin service to new communities. That policy reflected market conditions under which FGT "eagerly sought to obtain new customers and market plentiful supplies of gas," thereby reducing the per-unit cost of service to its existing customers. Pet. App. A17. Under that policy, FGT "many years ago paid for all or a portion of the ini-

tial laterals constructed on behalf of the existing customers." *Ibid.*

The Commission further found that, as the natural gas market changed during the late 1970s and early 1980s, "it is not surprising that FGT decided to revise its * * * policy [as reflected in the tariff]." Pet. App. A17. Since FGT's system had become fully utilized by existing customers and since sales through new lateral lines would no longer reduce FGT's per-unit cost of service, FGT revised its policy to require any existing customer to pay for any new lateral line. The Commission determined that FGT's change in policy was "reasonable and within its legitimate managerial prerogative." *Ibid.* And, since the Commission found no economic or other material distinction warranting different treatment of FGT's new and existing customers, it therefore construed FGT's tariff to apply the changed policy to both new customers, such as petitioner, and existing customers. *Ibid.*

3. Petitioner filed an application for rehearing before the Commission, principally contending that the Commission's interpretation of FGT's tariff is "*ultra vires* * * * because it retroactively creates a non-existing obligation (i.e., requiring a new customer to pay for its lateral line construction) on the pretense of preventing an undue discrimination against the existing customers, who, under [FGT's tariff], were explicitly required to pay for their lateral construction." Pet. App. A9.

In July 1987, after petitioner had requested rehearing (but before the Commission issued its decision), petitioner prevailed in its antitrust action against City Gas. *Consolidated Gas Company of Florida, Inc.* v. *City Gas Company of Florida, Inc.*, 665 F. Supp. 1493 (S.D. Fla. 1987), aff'd, 880 F.2d 297 (11th Cir. 1989); see note 2, *supra*. In that action, the district court held that City Gas had willfully acquired and maintained monopoly power in the relevant

natural gas market in violation of the Sherman Act and the Clayton Act. See 665 F. Supp. at 1515-1523, 1532-1542 (finding that City Gas injured petitioner by, among other actions, refusing to negotiate reasonable rates for the sale and transportation of natural gas to petitioner). Based on the record presented at trial, the district court observed that "[t]here is grave doubt as to whether [petitioner] could have effectively competed with City Gas" if petitioner had obtained natural gas directly from FGT and paid the cost of the connecting lateral. *Id.* at 1534.

In March 1988, the Commission denied petitioner's application for rehearing. Pet. App. A7-A12.[3] The Commission reiterated its refusal to "interpret [FGT's tariff's] silence on the lateral line payment obligations of new customers in such a manner as to require FGT to pay for the lateral construction cost of the new customers." *Id.* at A10. "Such an interpretation," the Commission determined, "would clearly confer an undue preference on the new customers over the existing customers, because existing customers would have to pay for lateral while new customers would not." *Ibid.*

4. The court of appeals denied the petition for review. Pet. App. A2-A6. The court accepted the Commission's rationale for interpreting FGT's tariff so as to treat new and existing customers the same, *i.e.*, by requiring both types of customers to pay the costs of a new lateral, even though FGT in the past had borne such costs:

> When a natural gas transmission pipeline is engaged in a major expansion, it will provide inducements in

[3] As petitioner concedes (Pet. 7), it never requested the Commission to consider the relevance of the district court's decision in *Consolidated Gas Company of Florida, Inc.* v. *City Gas Company of Florida, Inc.*, *supra*, with respect to the issue pending before the Commission—whether FGT's tariff should be interpreted to require petitioner to pay for the lateral line.

> order to tie new markets into its system; at the same time, its ability to spread the cost of a major expansion over a larger base of customers will enable it to achieve savings in the unit price of the gas it sells. When a pipeline is operating at capacity, however, the addition of a new customer will not accrue to the benefit of the system as a whole, and pipeline management may properly expect a new customer to absorb the full cost of the service it seeks.

Id. at A6.[4]

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review of petitioner's contentions regarding the proper construction of FGT's tariff is not warranted.

Petitioner contends (Pet. 11-15) that the Commission, although obligated by the NGA to take into account antitrust considerations, failed to consider the pertinent findings of the district court, entered in the separate antitrust action, that requiring petitioner to pay for a lateral line would impose "an insurmountable obstacle to competition." Pet. 11. Petitioner, however, did not raise this issue before either the Commission (see note 3, *supra*) or the court of appeals, and it has therefore not preserved it for review. *E.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977); *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

In the court of appeals, petitioner argued that the Commission's order would "prejudice [its] effort to regain

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[4] To the extent the Commission's decision rested on its view that FGT's tariff should not be read to impose presumptively discriminatory treatment among customers, the court of appeals rejected the Commission's view. Pet. App. A5-A6. Petitioner has not sought further review of this aspect of the court of appeals' judgment.

customers lost to [its] competitor, City Gas * * *." Pet. C.A. Reply Br. 15. Petitioner, however, explained that its "reference to the United States District Court finding to that effect was merely to confirm that an objective court saw what an allegedly expert agency refuses to see." *Id.* at 17. Thus, by asserting that its anticompetitive claim "had been adequately documented in the record and in the pleadings [before the Commission]," *id.* at 15, petitioner certainly never urged the court of appeals to consider, let alone be bound by, the findings made in the separate district court action.

In any event, neither the Commission nor the court of appeals had any basis for considering the record presented in the independent antitrust action.[5] Under established administrative law principles, the Commission must rule on an application for service, such as petitioner's request for service by FGT, based on substantial evidence in the record presented to the Commission. *E.g., Electricity Consumers Resource Council* v. *FERC*, 747 F.2d 1511, 1513-1514 (D.C. Cir. 1984); *City of Charlottesville* v. *FERC*, 661 F.2d 945, 949-950 (D.C. Cir. 1981), cert. denied, 475 U.S. 1108 (1986). Here, petitioner presented insufficient evidence to the Commission in support of its asserted claim that a rejection of its application would exacerbate the alleged antitrust violations committed by City Gas. See, *e.g.*, Pet. App. A48. And the Commission specifically found that even if petitioner paid for the lateral line, "there is enough of a reasonable likelihood that [petitioner] will retain its present customers and, therefore, be successful as a natural gas distributor

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[5] Petitioner never moved to include in the record before the Commission the evidentiary record that was before the district court. And, even after the district court issued its decision in July 1987, petitioner never requested the Commission to reopen the administrative record or to reconsider its orders in light of that decision. See also note 3, *supra*.

* * *." *Id.* at A32; see *id.* at A50-A51 (ALJ's findings concerning petitioner's ability to compete with City Gas). Indeed, in seeking a stay of the Commission's order, petitioner has already conceded that "conversion of [its] system to natural gas by a direct connection to the FGT system will be financially and economically feasible, no matter which way the Court rules [with respect to the issue whether petitioner must pay for the lateral line]." Pet. Mot. For Stay of Order 1-2, Docket No. CP82-342 (Jan. 24, 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1989

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* The Solicitor General is disqualified in this case

U.S. GOVERNMENT PRINTING OFFICE: 1988—262-203/00568